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# United States
# COURT OF APPEALS
## for the Ninth Circuit

VELJKO STANISIC,

*Petitioner,*

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE and ALFRED J. URBANO, District Director, United States Immigration and Naturalization Service,

*Respondents.*

## PETITIONER'S OPENING BRIEF

*Appeal from the United States District Court for the District of Oregon*



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## PETITIONER'S OPENING BRIEF

*Appeal from the United States District Court for the District of Oregon*

### JURISDICTIONAL STATEMENT

This matter was initiated by the order of Alfred J. Urbano, District Director of U. S. Immigration and Naturalization Service on June 21, 1966 directing that the petitioner appear at his office at Noon on June 24, 1966 for deportation to Yugoslavia. This order was based upon his alleged excludability at the

time of the alien's entry under Sec. 252 (b) of Immigration and Naturalization Act and proceedings under 8 CFR 253.1 (e). A Petition for Parole (R. 34-35) was promptly filed June 22, 1966 requesting a stay of execution and a hearing before a special inquiry officer of the Immigration Service, and in the alternative and in the event of denial of his petition that the petitioner might depart voluntarily from the United States at his own expense. The Petition for Parole was summarily denied (R. 32-33) on June 23, 1966 without hearing, whereupon on June 23, 1966 the petitioner filed in the U. S. District Court for the District of Oregon a complaint (R. 1-4) seeking a restraining order and supplemented such complaint with an order to show cause (R. 7-8), both of which were duly served upon the U. S. Immigration and Naturalization Service and Alfred J. Urbano, District Director, in civil action file No. 66-333. On June 24 the respondents, appearing by the U. S. Attorney for the District of Oregon filed an answer (R. 9-10) praying that the petitioner's complaint be dismissed. A brief hearing was held early on June 24, 1966 before the Honorable John F. Kilkenny, District Judge, wherein petitioner's complaint was denied (R. 20). Thereupon the petitioner immediately filed a notice of appeal (R. 21) to this honorable court.

This case comes before the court under Public Law 89-236, Sec. 11 (f), 79 Stat. 918, enacted October 3, 1965, and which amended 8 USC 1253 (h). Jurisdiction of this court rests in equity.

## STATEMENT OF THE CASE

The petitioner is an alien and a citizen of Yugoslavia who served as a radio operator on a Yugoslavian flag vessel which docked at Coos Bay, Oregon on or about December 23, 1964. The petitioner was given a landing permit as a D-1 crewman and came ashore numerous times. On or about January 6, 1965 he presented himself to the Immigration Service and sought asylum by a petition for parole under the provisions of 8 USC 1253 (h) as it then existed, providing for asylum in the case of physical persecution. The District Directer treated the matter as a case coming under 8 USC 1282 (b) as a *mala fide* seaman, revoking his landing permit, and without hearing ordered him removed to his vessel. Thereupon the petitioner obtained counsel who applied to the United States District Court for the District of Oregon, Case No. 65-10. for a hearing before a special inquiry officer under 8 USC Sec. 1252 (b) (R. 39-43), but on January 18, 1965 the court (R. 49) ordered the matter referred to the defendant District Director for the presentation of evidence in accordance with 8 CFR 253.1 (e) on the question of physical persecution. The following day, January 19, 1965, the petitioner did present evidence to the defendant District Director (see the Secret Testimony), and on January 26, 1965 the District Director denied petitioner's application for parole. The petitioner then filed a Motion for Review by the Court because of expressed and open bias of the District Director (R. 54). The District Director

moved for summary judgment, which the Court granted on July 20, 1965 (R. 86-95).

The petitioner's expulsion was stayed pending an application to Congress for a private bill. In the meantime the statute was changed on October 3, 1965 no longer to require physical persecution as a ground for asylum, but to allow in lieu thereof "persecution on account of race, religion, or political opinion." When the Congressional application was turned down in June, 1966 the defendant District Director on June 21, 1966 ordered the petitioner to appear about 70 hours later on June 24th for deportation to Yugoslavia by airplane. A Petition for Parole (R. 34-35) was filed June 22, 1966 requesting:

1. A stay of deportation to Yugoslavia on the basis of anticipated persecution on account of religious and political opinion, and on account of pending litigation in Lane County, Oregon;
2. A hearing before a Special Hearing Officer of the Immigration Service; and,
3. In the alternative, in the event of denial of the petition, leave to depart voluntarily from the United States at his own expense.

This petition was denied by the District Director without hearing on the new issues (R. 32-33). The same day, June 23, 1966, the petitioner filed in the United States District Court for the District of Oregon a complaint, Case No. 66-333 (R. 1-3) seeking a restraining order and relief under 8 USC, Sec. 1253 (h), on the ground of persecution on account of re-

ligion or political opinion, and such other and further relief as might be appropriate. A hearing was held early the next morning and the Court denied the relief sought on the ground of *res adjudicata* in Case No. 65-10 without considering the question presented to it (R. 20).

With the shifting of asylum goal posts from the requirement of physical persecution to those of persecution on account of religion or political opinion, the issues before this Court are:

1. Whether the decision in Case No. 65-10 is *res adjudicata* in Case No. 66-333.
2. Whether a D-1 crewman asylum and whose ship has left the territorial waters of the United States may be expelled only in accordance with normal deportation procedures, including a full and fair hearing before a Special Inquiry Officer and with right of appeal.
3. Whether, in the alternative, a D-1 crewman whose ship has left the United States should be given a reasonable time to complete arrangements to leave on a voluntary basis.

## SUMMARY OF ARGUMENT

An alien crewman granted a landing permit and then pleading for asylum from persecution may be expelled after his ship has left United States waters only in accordance with normal deportation procedures with full protection of the Constitution and its

Amendments. He is not to be treated as a ship-jumper, and therefore subject to peremptory exclusion. The summary hearing before the defendant District Director, without appeal, instead of the normal Special Inquiry Officer with due process and the safeguards of appeal, deprived the petitioner of his Constitutional rights.

While the petitioner was seeking a remedy in Congress the statutory goal posts were shifted by the amendment of 8 USC 1253 (h) so as not to require any longer proof solely of physical persecution; the goal posts became on October 3, 1965 "persecution on account of race, religion, or political opinion." The amendment raised a new right which could not have been adjudicated in Case No. 65-10. The right did not exist until October 3, 1965, months after the judgment in that case. The instant case, Case No. 66-333, is a fresh approach based on newly granted statutory rights.

In the light of the new standards, the secret testimony taken before Mr. William L. Pattillo, Deputy District Director of the Immigration and Naturalization Service, on January 19, 1965 yields ample evidence of highly probable political, religious, physical and family persecution awaiting this petitioner if he is returned to Yugoslavia (Secret Testimony, pp. 15-60, inc.). This secret testimony was reviewed *in camera* by the Honorable William L. East, District Judge in Case No. 65-10, but only as it dealt with "physical persecution" could it be relevant under the then ex-

isting statute. It is now relevant in all respects in the case before this Court to show the need as well as right of the petitioner for a full and normal deportation hearing before an impartial Special Inquiry Officer and with all the rights conferred by the Constitution, including the right of an appeal to the Board of Immigration Appeals and to the courts, if necessary. So far this has been denied to the petitioner.

Only as a last consideration, and if all remedies are denied to him, the petitioner, whose ship has long since left the waters of the United States and who has sought asylum from Yugoslavia, should be allowed a reasonable time to make arrangements to leave on a voluntary basis for some other haven free from persecution. The safety and best interests of the United States are not impaired by letting him find his own haven. Neither does it comport with decency or fair play to send a man against his wishes back to certain and cruel doom in a Communist-controlled country.

## SPECIFICATION OF ERRORS

1. The amendment of 8 USC 1253 (h), enacted October 3, 1965, liberalized the law and afforded to the petitioner a new right not existing theretofore, and denial thereof to the petitioner was error.

2. The court erred in not ordering procedural due process including a full and fair hearing as a matter of constitutional right under the Fifth Amend-

ment to a D-1 crewman seeking asylum and whose ship has left the United States.

3. The court erred in not ordering normal deportation procedures, including notice of charges, full and fair hearing by a Special Inquiry Officer, and an opportunity of appeal to the Board of Immigration Appeals to a D-1 crewman seeking asylum and whose ship has left the United States.

4. The court erred in not ordering the defendants to consider the prospect of harassment and prolonged imprisonment for violating exit restrictions as a factor to be considered under "persecution."

5. The court erred in not ordering the defendants to grant any full and real hearing on the facts and to hear new facts regarding religious and political persecution.

6. The court erred in not permitting in the alternative (all remedies unavailing) a D-1 crewman seeking asylum and whose ship has left the United States to have a reasonable time to complete arrangements to leave on a voluntary basis.

## ARGUMENT

### I

### Goal Post Moved

The amendment of 8 USC 1253 (h), enacted October 3, 1965, liberalized the law and afforded to the petitioner a new right not existing theretofore, and denial thereof to the petitioner was error.

So elementary a point need hardly be argued. The 1952 statute authorized the Attorney General to withhold deportation of an alien to a country where the alien would be subject to "physical persecution." It was only under this statute that the petitioner's Case No. 65-10 could be heard. Congress on October 3, 1965 enacted an amendment so that 8 USC 1253 (h) now provides:

> "(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subjected to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Subsequent thereto, and on June 22, 1966, the petitioner filed with the District Director of the Immigration and Naturalization Service his Petition for Parole (R. 34-35), under the new statute seeking stay of deportation on the basis of anticipated persecution on account of religious and political opinion. No hearing was held, and within hours it was denied by the District Director (R. 32-33) on the ground that the decision in Case No. 65-10 was *res adjudicata* here.

In *Soric* v. *INS*, 384 U.S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1283, decided December 1, 1965, shortly after the enactment of the amendment to 8 USC 1253 (h), the court remanded the case to the Immigration and Naturalization Service "for consideration of the claims for relief as authorized by the 1965 amendments to the Immigration and Nationality Act." A similar result should follow in the case at bar.

A new right has been created which cannot be denied to petitioner.

## II

### Protection of Constitution

The court erred in not ordering procedural due process including a full and fair hearing as a matter of constitutional right under the Fifth Amendment to a D-1 crewman seeking asylum and whose ship has left the United States.

An alien D-1 crewman seeking asylum is not in the same category as a D-1 crewman simply jumping ship. *Szlajmer* v. *Esperdy*, 188 F. Supp. 491 (SDNY, 1960). He is entitled to procedural due process. *Sovich* v. *Esperdy*, 319 F.2d 21 (C.A. 2, 1963). This includes review by the courts of the administrative determination of "persecution on account of race, religion, or political opinion." *Dunat* v. *Hurney*, 297 F.2d 744 (C.A. 3, 1961). The refusal of the defendant District Director to give the petitioner a full and fair hearing, or any hearing at all for that matter, before a Special Inquiry Officer makes a mockery of due process. It is shabby procedure to dispose of the question of asylum by a hearing within a matter of hours before the man who is at one and the same time arresting officer, judge, jury, and executioner. Such practice in other lands is roundly condemned, and rightly so. The District Director and the court below have lost sight of the humanitarian concern of Congress and the rights conferred by the Constitution even on an alien crewman.

Because of the severe consequences of deportation, the Supreme Court has declared that deportation statutes must be very narrowly construed i.e., liberally in favor of the alien. In *Rosenberg* v. *Fleuti*, 374 U.S. 449, 10 L. Ed. 2d 1000, 83 S. Ct. 1804 (1963), at 374 U.S. 458 the Court said:

> "The most basic guide to congressional intent as to the reach of the exceptions is the eloquent language of Di Pasquale and Delagadillo themselves, beginning with the recognition that the 'interests at stake' for the resident alien are 'momentous', . . . and that '[t]he stakes are indeed high and momentous for the alien who has acquired his residence here', . . . This general premise of the two decisions impelled the more general conclusion that 'it is . . . important that the continued enjoyment of . . . [our] hospitality once granted, shall not be subject to meaningless and irrational hazards.' . . . [I]t is difficult to conceive that Congress meant its approval of the liberalization wrought by Di Pasquale and Delgadillo to be interpreted mechanistically to apply only to cases presenting factual situations identical to what was involved in those two decisions."

Here the petitioner after he had been ashore in Coos Bay, Oregon, many times after December 23, 1964, frankly sought asylum by presenting himself to the Immigration and Naturalization Service. He did not hide or refuse to cooperate. Neither did he obtain the landing permit by fraud. But with the memory of 30 close relatives killed by the Communists (Secret Testimony, p. 26) and the oppressive atmosphere in Yugoslavia as well as the high probability

of unusual and vicious punishment for seeking illegal exit once more (ibid., at pp. 29, 34) this man's life and limb are now seriously in jeopardy. Before he is finally consigned to his tormentors he should be given every constitutional guaranty of procedural due process.

Furthermore, the purpose in providing for a summary hearing before District Director is to enable the ship to proceed with its full crew from our shores. But the SS Sumadija has long since left these shores and the need for haste no longer exists. With the reason gone, the procedure should follow our time-honored tradition of fair play with every protection of the Constitution.

## III

### Normal Deportation Procedure

The court erred in not ordering normal deportation procedures, including notice of charges, full and fair hearing by a Special Inquiry Officer, and an opportunity of appeal to the Board of Immigration Appeals to a D-1 crewman seeking asylum and whose ship has left the United States.

In "Immigration Law and Procedure," by Gordon and Rosenfield, the rule is set forth at page 633:

> ". . . D-1 crewmen whose vessel has left, may be expelled in accordance with the normal deportation procedures . . . . This means that they are entitled to notice of the charges, a full and fair hearing, and opportunity for appeal to the Board of Immigration Appeals, in the event their de-

portation is ordered by a Special Inquiry Officer. And in such deportation proceedings they may apply for any discretionary remedies that may be applicable, such as voluntary departure, suspension of deportation, pre-examination, stay of deportion on ground of anticipated physical persecution or any other appropriate dispensation . . ."

Petitioner's ship has already left and the need for summary deportation no longer exists. This was the result reached in the *Matter of M*, 5 I.N. 127 (1953). A similar result should follow here.

## IV

### Harassment as Persecution

The court erred in not ordering the defendants to consider the prospect of harassment and prolonged imprisonment for violating exit restrictions as a factor to be considered under "persecution."

In *Sovich* v. *Esperdy*, 319 F.2d 21 (C.A. 2, 1963), at p. 28, the court said:

> ". . . It would be naive to suppose, therefore, that punishment for illegal departure, under these circumstances, is not politically motivated, nor does not constitute punishment 'because of . . . political opinion'."

And again at p. 29:

> ". . . We are unwilling to believe, however, that Congress has precluded from relief under § 243 (h) an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictator-

ship. Such construction of the statute would attribute to Congress an insensibility to human suffering wholly inconsistent with our national history.

"We hold, therefore, that the Attorney General, through his delegate, erroneously construed the limits of his discretion in ruling that imprisonment for illegal departure may never constitute 'physical persecution' within the purview of § 243 (h)."

Judge Medina, concurring, added at p. 30:

". . . I do not see how the rulings of the Special Inquiry Officer and the Regional Commissioner can mean anything other than that imprisonment for illegal departure may never constitute 'physical persecution.' If this is so, the construction thus given to the statute is not only utterly repugnant to our national traditions and history, it is also patently inconsistent with the intention of the Congress in enacting Section 243 (d). A decision based upon such misreading of the law must necessarily be capricious and arbitrary."

The issue before the District Director on January 19, 1965, under the statute then in force, was solely "physical persecution." Even so the petitioner testified (Secret Testimony, p. 34) that he would be punished more severely for leaving the ship because he was anti-Communist and believed in God and was suspected of being a spy for the United States. The District Director chose to ignore this testimony in his summary determination that there was no evidence of persecution.

No hearing whatever was held in June, 1966 on the Petition for Parole. There was a complete disregard of the law and the facts.

This court should require the Immigration and Naturalization Service to receive full and complete testimony on the entire issue of religious and political persecution before a Special Inquiry Officer, including evidence of harassment and prolonged imprisonment for violating exit restrictions. Anything less would be a sham.

## V

### New Facts

The court erred in not ordering the defendants to grant any full and real hearing on the facts and to hear new facts regarding religious and political persecution.

With the shifting of the goal-posts (8 USC 1253 (h) as amended October 3, 1965) the petitioner is entitled to present evidence of persecution because of religion or political opinion. No hearing on this issue has ever been held in this case.

But more. He should have a full and real hearing, not just before a District Director who has already been charged with bias and prejudice and a closed mind even before any testimony was given on January 19, 1965 (R. 75-76). It should be a hearing at which the petitioner may present new facts regarding religious and political persecution. And the hearing should be before a Special Inquiry Officer. "Immigra-

tion Law and Procedure" by Gordon and Rosenfield, p. 633.

## VI

### Voluntary Departure

The court erred in not permitting in the alternative, and all remedies unavailing, a D-1 crewman seeking asylum and whose ship has left the United States to have a reasonable time to complete arrangements to leave on a voluntary basis.

The petitioner faces a hard fate if he is compelled to return to Yugoslavia, and the United States gains nothing by subjecting him to such a future. The safety and best interests of the United States are not impaired by letting him find his own haven.

In *Chang* v. *INS*, 358 F.2d 699 (C.A. 3, 1966) such an order was upheld, together with the alternative that if he failed to depart the INS could designate a country.

In the *Matter of F*, 9 I.N. 333 (1961), a Yugoslav seaman trying to ship out to Trinidad, with distinct probability of success, was given a reasonable time to complete arrangements. In that case it was indicated that this would take at least 60 days.

Therefore, and only as a last resort if petitioner's appeal should fail, he should be allowed time to find a hospitable land to which to go.

## CONCLUSION

Petitioner contends that under the clear language of 8 USC 1253 (h) as amended on October 3, 1965 new statutory rights have been conferred which have never been adjudicated and on which he is entitled to be heard under the Constitution in a full and fair hearing before a Special Inquiry Officer of the Immigration and Naturalization Service according to normal deportation procedures.

In the alternative, and only if all other remedies are unavailing, he should be allowed a reasonable time to leave on a voluntary basis.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.